Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PEARSON EDUCATION, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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PETITION FOR A WRIT OF CERTIORARI

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board infringes upon an employer's First Amendment rights when it interprets a one page written communication made during a union organizing campaign to be a threat if the individual statements in that single communication, on their face, are accurate and otherwise lawful and when it fails to even consider other surrounding communications on that same topic?

2. In a non-*Gissel* bargaining order case, what effect should significant changed circumstances that have occurred since the time, years earlier, that the National Labor Relations Board originally designated and certified the bargaining unit, but before final resolution of the parties' obligation to bargain in that unit, have on the continued appropriateness of that unit and the Section 7 self determination rights of all current employees, who had no opportunity to exercise that right.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner states that Pearson Education, Inc. is engaged in the publishing and distribution of books and related materials. It is a Delaware corporation which is a wholly-owned indirect subsidiary of Pearson, Inc., which is itself a wholly-owned indirect subsidiary of Pearson plc, which is publicly traded in the United Kingdom and the United States.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE PETITION	11
CONCLUSION	22
APPENDIX	1a

TABLE OF AUTHORITIES

CASES — Page

Allentown Mack Sales and Serv. v. NLRB, 522 U.S. 359 (1998) 12
Boire v. Greyhound Corp., 376 U.S. 473 (1964) ... 3
Border Steel Rolling Mills, Inc., 204 NLRB 814 (1973) 19
Brooks v. NLRB, 348 U.S. 96 (1954) 21
Carry Co. of Illinois, Inc., 310 NLRB 860 (1993) 13
Charlotte Amphitheater Corp. v. NLRB, 82 F.3d, 1074 (D.C. Cir. 1996) 21
Coach & Equip. Sales Corp., 228 NLRB 440 (1977) 13
Crown Cork & Seal Co. v. NLRB, 36 F.3d 1130 (D.C. Cir. 1994) 18
Edward J. De Bartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council, 485 U.S. 568 (1988) 13
Emporium Capwell Co. v. W. Addition Cmty. Org., 420 US 50 (1975) 20
Fern Terrace Lodge, Inc., 297 NLRB 8 (1989) 14
Flamingo Hilton-Laughlin v. NLRB, 148 F.3d 1166 (D.C. Cir. 1998) 13, 21
Kelley Bus. Furniture, Inc., 288 NLRB 474 (1988) 19
Harper Collins San Francisco v. NLRB, 79 F.3d 1324 (9th Cir. 1996) 21
Impact Industries, Inc. v. NLRB, 847 F.2d 379 (7th Cir. 1998) 21
Lear-Siegler Mgmt. Serv. Corp., 306 NLRB 393 (1992) 14
Lechmere, Inc. v. NLRB, 502 US 527 (1992) 20

TABLE OF AUTHORITIES—Continued

Page

Lee Lumber and Bldg. Material Corp., 306 NLRB 408 (1992), *aff'd* in part, *rev'd* in part, 117 F.3d 1454 (D.C. Cir. 1997) 14
Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53 (1966) 12
Metropolitan Life Ins. Co., 266 NLRB 507 (1983) 13
Midland Nat'l Life Ins. Co., 263 NLRB 127 (1982) 13
NLRB v. Gissel Packing Co., 395 U.S. 575 (1969) 12, 19, 21, 22
NLRB v. Golub Corp., 388 F.2d 921 (2nd Cir. 1967) 15
NLRB v. Herman Wilson Lumber Co., 355 F.2d 426 (8th Cir. 1966) 15
Pattern Makers' League of N. Am., AFL-CIO v. NLRB, 473 US 95 (1985) 20
Ramada Beverly Hills, 278 NLRB 691 (1986) 19
Renaissance Ctr. P'ship., 239 NLRB 1247 (1979) 20
St. Bernadette's Nursing Home, 234 NLRB 835 (1978) 19
So-Lo Foods, Inc., 303 NLRB 749 (1991), *aff'd* 985 F.2d 123 (4th Cir. 1993) 14
Southwire Co. v. NLRB, 383 F.2d 235 (5th Cir. 1967) 12, 15
Stumpf Motor Co., Inc., 208 NLRB 431 (1974) 14
Taylor-Dunn Mfg. Co., 252 NLRB 799 (1980), *aff'd* 679 F.2d 900 (9th Cir. 1982) 14
Tech. Serv. Solutions, 332 NLRB No. 100 (2000) 15
Texas Industries, Inc. v. NLRB, 336 F.2d 128 (5th Cir. 1964) 15

TABLE OF AUTHORITIES—Continued

Page

UARCO, Inc., 286 NLRB 55 (1987) 13, 17

CONSTITUTIONAL AND STATUTORY PROVISIONS

First Amendment 2, 12, 13, 14, 16, 18
28 U.S.C. § 1254(1) 2
29 U.S.C. § 157 ..... 2, 18, 20, 22
29 U.S.C. § 158(c) 2, 11, 12, 15, 16, 18
29 U.S.C. § 160(f) 3

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 373 F.3d 127. (App. 1a-11a). The National Labor Relations Board's August 1, 2002 decision denying rehearing and reopening of the record is unreported. (App. 19a-42a). The Board's October 31, 2001 decision is reported at 336 NLRB No. 92. (App. 19a-42a). The prior related decision of the Court of Appeals in this case is reported at 194 F.3d 165. (App. 43a-49a). The initial decision of the National Labor Relations Board is reported at 327 NLRB No. 17. (App. 50a-59a). The Regional Director's May 15, 1998 decision overturning the first election and ordering another election is unreported. (App. 60a-67a).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the District of Columbia enforced the decisions of the National Labor Relations Board and entered judgment on July 6, 2004. This petition is timely because Petitioner has filed it within 90 days of July 6, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves application of the First Amendment of the United States Constitution in interpreting Section 8(c) of the National Labor Relations Act, 29 U.S.C. § 158(c). It also involves interpretation of employees' rights under Section 7 of that Act.

The First Amendment of the United States Constitution provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech . . . ."

29 U.S.C. § 157 provides in pertinent part:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . ."

29 U.S.C. § 158(c) provides:

> "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the

> provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

29 U.S.C. § 160(f) provides in pertine part:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside.

STATEMENT OF THE CASE

This Petition for Writ of Certiorari is filed to review a decision of the United States Court of Appeals for the District of Columbia granting the National Labor Relations Board's Cross-Petition and enforcing its orders. The Court of Appeals had jurisdiction pursuant to Section 10(f) of the National Labor Relations Act. 29 U.S.C. § 160(f). *See Boire v. Greyhound Corp.*, 376 US 473, 476-77 (1964).

A. The Election Petition And Unit Determination.

Macmillan Publishing (Macmillan or the Company) had two - distribution operations in Indianapolis, Indiana at Northwest Boulevard and Rockville Road, as well as operations in other states. In 1997, Macmillan had a state of the art facility under construction at Lebanon, Indiana in an adjacent county which was designed to be a vertically integrated Customer Center. In April, 1997, Macmillan informed distribution employees that in the summer it would announce wage increases that would be effective in January, 1998, when the Customer Center opened.

In June, 1997, the Union of Needletrades, Industrial and Textile Employees (Union) filed a petition with the National Labor Relations Board (NLRB) to represent employees at the

two Indianapolis distribution facilities. After an evidentiary hearing, the NLRB's Regional Director designated the appropriate bargaining unit as warehouse and distribution center employees at the Northwest Boulevard and Rockville Road facilities, including its two primary classifications, picker/packers and stocker/truckers. On August 1, 1997, Macmillan announced the wage increases that employees would begin receiving when they moved to the Customer Center.

B. Campaign Communication About Collective Bargaining.

Before the election, the Union and Macmillan campaigned vigorously and communicated with employees in writing and verbally. One topic they addressed was collective bargaining and its potential impact on wages and benefits.

1. The Union's literature.

The Union distributed multiple pamphlets which predicted Macmillan would say bargaining started "from scratch", informed employees that bargaining started from what they currently had, and told employees "when you negotiate a first contract, you start with the pay and benefits you have now and build on them." Five days before the election, internal union organizers secured a written opinion from the Union's lawyer addressing the consequences of a Union victory on the employees' January wage increases. The letter told employees that if the Union lost, Macmillan could decide not to implement the increases. It also informed employees that if the Union won, Macmillan could not refuse to implement the increases and, if it did, that would be unlawful. Union supporters sought to share this letter with co-workers.

2. The Company's literature.

Macmillan distributed a leaflet entitled "Collective Bargaining It's a Huge Gamble," which stated that benefits and

wages could be reduced through the bargaining process. The Company told employees that the law required it to bargain in good faith and posed the following:

> Question: The Union has told us that collective bargaining means we "start with the wages and benefits we now have and build on them." Is that true?
>
> Answer: No! In the "horse-trading" process of collective bargaining, it is possible that wages and benefits could be affected, either positively or negatively. . . .

The text of the other leaflet the Company distributed about bargaining stated:

WHAT DO YOU HAVE TO LOSE?

HOW ABOUT:

$2,522.00 next year!

$1.10 per hour	$1.25 per hour
x 40 hours per week	x 40 hours per week
$44.00 per week	$50.00 per week
x 13 weeks =	x 39 weeks =
$572.00 in Jan - Mar	$1,950.00 Apr - Dec

For a total of $2,522.00 next year

Without a union, Macmillan will be free to proceed ahead with the announced wage increases for the Lebanon move.

With a union, since all wages and benefits would be subject to negotiation, no one can predict what the final wage package would be.

WHY TAKE THE RISK?
VOTE NO!

The $1.10 and $1.25 mentioned were the amounts of the previously announced increases effective upon moving to the Customer Center.

3. The Company's related verbal communications.

Macmillan's President told employees in large group meetings they would get the announced increases regardless of whether the Union was voted in or not, that the Company would negotiate in good faith and that their current benefits would be the point where negotiations began and could go up or down.

The Human Resource (HR) Manager told employees in one series of meetings: "There are no guarantees that the current benefits that the Company has will be your benefits after negotiations. Your current benefits are merely a starting point and they could go up or down as a result of negotiations." In another series of meetings, he told employees:

> The Union has told the employees at Macmillan that the collective bargaining process means that things can only go up or get better as a result of collective bargaining. That's their promise, but that's <u>not</u> the reality. Far too many workers in America have found out that the collective bargaining process means you start with what you have now when you begin bargaining, but at the end of the bargaining process, individual items that were negotiated can be increased or decreased.

A Union witness present at one of the meetings testified that the HR Manager said employees could lose benefits, everything would be on the table and the parties would negotiate from there. She further testified that he said employees could lose what they had in negotiations.

The HR Manager also was called into a small meeting after an employee announced in the meeting that Macmillan's

President told employees they would get the increases regardless of whether the Union was voted in or not. A Union witness testified that the HR Manager stated he did not believe they would because negotiations started at zero or from scratch. The HR Manager also said, however, that if the Company had committed to wage increases, they would be part of the baseline and beginning point for negotiations.

C. Objection To The Company Leaflet, The Rerun Election And Appeals.

The Union lost the election and filed objections to Macmillan's campaign conduct. Without a hearing, the NLRB's Regional Director sustained an objection based solely on Macmillan's "What Do You Have to Lose" leaflet, overturned the election and ordered a re-run election.

In January, 1998, Macmillan consolidated the two Indianapolis distribution operations into the new Customer Center in Lebanon. The NLRB held the rerun election in June, 1998, which the Union won by a swing of three votes, and the NLRB certified it as the bargaining representative for the originally designated unit. To challenge the underlying certification, Macmillan declined to bargain, and in October, 1998, the NLRB ordered it to bargain. Macmillan filed a Petition for Review with the Court of Appeals arguing, *inter alia*, that the leaflet was protected by Section 8(c) and the First Amendment. The NLRB cross-petitioned for enforcement. In November, 1998, Pearson, Inc., a British company, bought Macmillan.

In November, 1999, the Court of Appeals granted the Company's Petition for Review and remanded the case, finding that the Regional Director's decision was the "antithesis of sound reasoning" and the principle upon which he relied did not, and could not, exist in "light of the First Amendment." (App. 48a-49a).

D. The Subsequent Hearing And Appeals.

In June, 2000, an Administrative Law Judge (ALJ) held an evidentiary hearing on the Union's objections to the first election. Pearson, the new owner, filed a motion with the ALJ challenging the continued appropriateness of the unit in view of numerous significant changed circumstances. In December, 2000, the ALJ found the leaflet was unlawful because it mischaracterized the law and advised employees they risked losing the raise if the Union won because everything would be negotiable. (App. 37a). He also denied Pearson's motion challenging the continued appropriateness of the unit. (App. 42a).

In October, 2001, the NLRB affirmed and ordered Pearson to bargain. In November, 2001, Pearson filed with the NLRB a Motion for Reconsideration and to Reopen the Record or for Rehearing on the Current Appropriateness of the Unit. In August, 2002, the NLRB, by a 2-1 vote, denied that Motion. (App. 12a-18a). Pearson then filed a Petition for Review of those decisions arguing, *inter alia*, the leaflet was a lawful communication and also that, at a minimum, the Board should have held a hearing on the significant changed circumstances issue and taken evidence. The NLRB cross-petitioned. On July 6, 2004, the Court of Appeals enforced the NLRB's cross-petition finding that the leaflet was a threat and a basis to overturn the first election. It rejected Pearson's arguments on changed circumstances.

E. Changed Circumstances Since The Regional Director Designated And Certified The Bargaining Unit.

Since the Regional Director's designation of the bargaining unit and the two elections, numerous changed circumstances of a substantial nature occurred.

1. Change in Company ownership and management.

Macmillan was a subsidiary of Viacom, a publicly traded U.S. corporation, headquartered in Indianapolis and its facilities reported through a management structure located in Indianapolis. In November of 1998, it was sold and became a wholly owned subsidiary of Pearson Education, Inc., a subsidiary of Pearson, Inc., a British corporation. The Customer Center then reported through the Pearson management structure located in New York and New Jersey and a Pearson management team is in place. As the Customer Center expanded, its management team did also. As of November, 2001, there were 30 members of the Pearson management team at the facility.

2. Expansion of products and doubling of Customer Center.

Beginning in November, 1998, the Customer Center handled not only the former Macmillan products, but multiple products of Pearson Education, Prentice Hall Direct, Financial Times, Addison-Wesley, Prentice-Hall School Division, and Pearson Technical Reference. Additionally, the Customer Center originally comprised approximately 545,000 square feet, but in September, 2001, Pearson completed construction of an additional 500,000 square feet.

3. Consolidation of numerous operations from other states at the Customer Center between 1998 - 2001.

In 1998, Macmillan relocated the Customer Service, Order Entry, Reconciliation, Accounts Receivable, Credit Collections and Inside Sales to the Customer Center from other locations in Indianapolis. It also relocated digital material distribution operations from New Jersey to the Customer Center. Assembly operations that had been outsourced were then brought in-house at the Customer Center.

After Pearson became owner, it continued to consolidate multiple operations from elsewhere to the Customer Center. In 1999, Pearson relocated operations from Orangeburg, New York; from West Nyack, New York; from Pennsylvania; and other operations from Indianapolis. In 2000 and 2001, Pearson relocated additional operations to the Customer Center, including operations from Indianapolis, operations from Pinola, Indiana, and more operations from West Nyack, New York. Pearson also acquired a company in Chicago and relocated those operations to the Customer Center.

4. Doubling of the workforce.

In August, 1997, approximately 200 Macmillan employees worked at the two Indianapolis distribution centers. In June of 1998, there were approximately 280-300 Macmillan employees at the Customer Center. As of November, 2001, there were over 600 Pearson employees working there. Only 52 of the original 160 eligible voters working for Macmillan in August, 1997 continued to work for Pearson at the Customer Center as of November, 2001, and only 62 remained from the June, 1998 eligible voters.

5. New job classifications, cross-training, equipment, and processes.

Under Pearson, the Customer Center has different and additional job classifications including material handler, equipment operator, mechanics and clerks. There was no cross-training of distribution employees and support employees by Macmillan. Pearson cross-trains distribution employees and support service employees so that they can assist in peak business periods.

Wire guidance systems, turret trucks, new and faster conveyor systems, cold seal machines, bar code generators, automated shipping sorters, low profile pallet wrappers, trash conveyors and mirrored lines were not used at the

Indianapolis distribution facilities. All of these higher tech pieces of equipment are used at the Customer Center. A "pick to light" system was not used at the Indianapolis facilities. This newer higher tech system is used at the Customer Center.

REASONS FOR GRANTING THE PETITION

Under Supreme Court Rule 10, a Petition for Writ of Certiorari is appropriate when a United States Court of Appeal decides an important question of federal law that has not been, but should be, settled by this Court or has decided an important federal question in a way that conflicts with relevant decisions of this Court. The Court of Appeals' decision in this case raises important questions of constitutional and federal labor law about the interplay between the First Amendment and Section 8(c) of the National Labor Relations Act. The emergence of a global economy and declining membership have led to increased emphasis by labor unions on trying to organize employees across the Country. It is in the interests of unions, employers, the employees they both seek to persuade and national labor policy, that the Court clarify the standards to be applied and the limits on the Board's ability to infringe on First Amendment protections. This case also raises important questions of federal labor law as to the rights of employees under Section 7 of the National Labor Relations Act when there have been significant changed circumstances since a bargaining unit was designated and certified but before final resolution of the parties' legal obligation to bargain in that unit. The Court's review is warranted for the following reasons:

1. This case raises the important constitutional question of whether the National Labor Relations Board violates an employer's First Amendment rights when it interprets a written communication made by the employer during a union organizing campaign to be a threat when each of the statements contained in that communication are true and otherwise lawful.

Thirty-five years ago, in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969), this Court recognized that Section 8(c) of the National Labor Relations Act ("Act") implements the First Amendment into that statute and that employers have a firmly established right to communicate views to employees which cannot be infringed by a union or the National Labor Relations Board ("NLRB" or "Board"). The one narrow restriction on an employer's free speech is that the communication cannot be a threat of reprisal or force or promise of benefit. *Id.* at 618. Thus, the Board's regulatory authority over speech is limited to cases where an employer's communication is a threat of reprisal or coercion. *Allentown Mack Sales and Serv. v. NLRB*, 522 U.S. 359, 386 (1998) (Rehnquist, C.J., dissenting).

Because campaigning by unions and employers during a organizational drive is often vigorous and responsive to one another, Section 8(c) is intended to encourage and allow a wide latitude of debate. *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 62 (1966) ("[C]ases involving speech are to be considered against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide open . . . ."); *see also Southwire Co. v. NLRB*, 383 F.2d 235, 241 (5th Cir. 1967) ("The guaranty of freedom of speech . . . goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the

choices available."). Indeed, even misstatements and mischaracterizations of the law have long been held not to be unlawful campaign conduct. *Carry Co. of Illinois, Inc.*, 310 NLRB 860 (1993); *Metropolitan Life Ins. Co.*, 266 NLRB 507 (1983); *Midland Nat'l Life Ins. Co.*, 263 NLRB 127 (1982). In this important area, the Board's construction of the Act is not entitled to deference if its interpretation raises questions of validity under the First Amendment. *Edward J. De Bartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 574-577 (1988). This is just such a case.

Employers and unions try to educate employees on advantages and disadvantages to unionization so they can make an informed decision. It is well settled that an employer is free to communicate the potential risks and downsides of unionization, and references to those risks and possible negative outcomes of unionization do not deprive its campaign statements of their legitimacy. *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1174 (D.C. Cir. 1998) (citing *UARCO, Inc.*, 286 NLRB 55, 58 (1987)). One of those risks is the unpredictability of the collective bargaining process on wages and benefits the employer already provides.

Collective bargaining is almost always a focus of communications during a union organizing campaign. Employees often mistakenly believe that, when collective bargaining begins, they start with what they have and negotiations can only go one way - up. A no lose proposition. The law, however, is clear that through the collective bargaining process, existing wages and benefits (i.e., the employees' status quo) can go up, can go down, or be eliminated and that an employer is allowed to inform employees of that risk. *Coach & Equip. Sales Corp.*, 228 NLRB 440, 441 (1977) (It is legitimate to tell employees that collective bargaining is potentially hazardous and as a result of negotiations, they might possibly wind up with less after unionization than

before.); *Stumpf Motor Co., Inc.*, 208 NLRB 431, 432 (1974) ("An employer is free to indicate to his employees what the possible result of bargaining may be, and to call their attention to the possibility or even probability that certain existing benefits may be traded away for others."); *see also Fern Terrace Lodge, Inc.*, 297 NLRB 8 (1989) (Employer has as much right to ask for wage reductions as a union has to ask for increases.). As long as the risk of loss is tied to the collective bargaining process, the communication is lawful. It is only when that risk is not communicated in the context of collective bargaining that statements are threats. *Lear-Siegler Mgmt. Serv. Corp.*, 306 NLRB 393 (1992); *So-Lo Foods, Inc.*, 303 NLRB 749, 750 (1991), *aff'd* 985 F.2d 123 (4th Cir. 1993); *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), *aff'd* 679 F.2d 900 (9th Cir. 1982).

Here, the Macmillan employees' status quo included their then current wage rates plus the earlier announced wage increases effective in January. Macmillan's leaflet stated that wage increases might be at risk because no one could tell what the final wage package would be after the collective bargaining process ended. The statement is true and describes the law. It is no different than if Macmillan had stated "What do you have to lose? How about some of your existing wages and benefits because everything is negotiable and no one knows what the final outcome will be." This latter statement is clearly protected by the First Amendment.

The Board and the Court of Appeals, however, interpreted the leaflet to be a threat of reprisal by Macmillan to deny employees the increases if they voted for the Union and require the Union to bargain the increases back. That conclusion read into the leaflet something it did not state. Otherwise lawful statements do not become unlawful merely because they have the effect, intended or otherwise, of causing employees to abandon their support for the union. *Lee Lumber and Bldg. Material Corp.*, 306 NLRB 408, 409-

10 (1992), *aff'd* in part, *rev'd* in part, 117 F.3d 1454 (D.C. Cir. 1997); *see also*, *Southwire Co. v. NLRB*, 383 F.2d 235, 241 (5th Cir. 1967) (The mere fact that campaign propaganda may induce fear does not deprive it of the protection of Section 8(c). That is often the nature of campaign propaganda.).

A threat of reprisal is a statement by the employer, that it will take some specific adverse action against employees in retaliation for the employees voting for Union representation. *NLRB v. Golub Corp.*, 388 F.2d 921, 928 (2nd Cir. 1967) (a threat is if an adverse consequence will be "deliberately inflicted in return for an injury—to return evil for evil"). Macmillan's leaflet did not say that. The leaflet did *not* say that if the Union won, Macmillan would withhold or refuse to give the already committed wage increases, nor did it state that Macmillan would only give the wage increases if the Union was able to negotiate them back. Instead, the leaflet said Macmillan would be free to give the wage increases if the Union lost - a true and otherwise lawful statement. It also said that if the Union won, no one would know whether the employees' wages (which included the already announced January increases) would remain at those levels after negotiations were concluded—also a true and otherwise lawful statement. *Tech. Serv. Solutions*, 332 NLRB No. 100 at 20-21 (2000) (in reference to an announced pay raise, the employer stated, "[d]epending on the negotiations, I don't know whether you will keep it or not; . . . that will be up to union negotiations." The ALJ held that was "not a threat but an accurate description of an unpredictable process . . . .").

Communication in a leaflet of independent, accurate and otherwise legal statements about the status quo of a wage package and the risk of unpredictability of a final wage package due to the collective bargaining process, is protected by Section 8(c). *NLRB v. Herman Wilson Lumber Co.*, 355 F.2d 426, 431-432 (8th Cir. 1966) (citing *Texas Industries, Inc. v. NLRB*, 336 F.2d 128 (5th Cir. 1964)) (An employer is

a rightful contestant for his employees' loyalty in a union election. Section 8(c) permits an employer to state his legal rights under the Act and to predict that dire economic consequences will follow from union victory. Inasmuch as the Company did not state anything more than its legal rights, the challenged remarks fall within Section 8(c)). This Court should clarify the standard to be applied in this important area.

2. This case raises the important constitutional issue of whether the National Labor Relations Board infringes on an employer's First Amendment rights when it interprets a single communication, that is but one part of a continuum of communications on the same issue, in isolation, or is it required to consider that communication in context with other communications on that same subject before determining that it is a threat and not protected speech.

In addition to being robust and partisan, pre-election campaigns extend over a period of weeks and often include multiple communications by unions and employers on a common topic. Before interpreting a single leaflet, that is but one piece of that communication continuum, as a threat, the Board should be required under the First Amendment to analyze the challenged communication, not in a total vacuum, but rather, interpret it in context and with other surrounding related communications made by the union and the employer. Those related communications give the challenged communication context when deciding the important and fundamental issue of whether it is protected by the breadth of the First Amendment or is one that falls into the very narrow prohibition of a threat under Section 8(c), particularly if it could be viewed two different ways. In this instance, however, despite the fact there were multiple related communications from both the Union and the Company on collective bargaining, the Board and the Court based their

decision solely on the four corners of the leaflet which was but one piece of the relevant communication continuum.

Totally ignored was the important evidence that Macmillan's President had assured employees in large group meetings that the Company would give the wage increases whether the Union won or not and would bargain in good faith as well as the HR Manager's statement that if the President had committed to a wage increase, it would be part of the baseline from which negotiations started. Those important directly related comments, taken together with the leaflet, give it context and show not a threat, but confirmation that employees would receive the wage increase and what happened to employees' final wages after that would depend on the risks inherent in the give and take of collective bargaining. *See UARCO, Inc.*, 286 NLRB 55, 58 (1987) (Bulletins contained no expressed threats of any kind nor any falsehoods. When considered in proper conjunction with the company's oral assurances that it would bargain and bargaining could go up or down, the literature had no reasonable tendency to coerce.).

Also ignored was the significant evidence that just days before, the Union obtained an opinion letter from its lawyer telling employees that if the Union lost, Macmillan could refuse to give the already announced wage increases. Macmillan's leaflet responded to that comment by stating it would be free to give the increases. Further ignored was the significant fact that in that same letter, the Union's lawyer assured employees that Macmillan could not refuse to give the increases if the Union won because it would be unlawful. That gives highly relevant context to the leaflet. Macmillan was making a counterpoint directly to the Union's comment by reminding employees what it previously had told them - namely, their final wage rates ultimately would be determined by the unpredictable collective bargaining process. The failure to even consider this important contextual evidence

when assessing whether the leaflet was a threat, violated the Company's First Amendment rights.

As aptly stated in *Crown Cork & Seal Co. v. NLRB*, 36 F.3d 1130, 1140 (D.C. Cir. 1994),

> "If the Board may take management statements that very emphatically assert a risk, twist them into claims of absolute certainty, and then condemn them on the ground that as certainties they are unsupported, the free speech right is pure illusion. To be sure, Crown could have expressed the probable impact . . . more cautiously. But if unions are free to use the rhetoric of Mark Antony while employers are limited to that of the Federal Reserve Board Chairman, again the employer's speech is not free in any practical sense."

This Court should clearly define the role context and related communications should play when balancing First Amendment rights with an isolated communication alleged to be a threat under Section 8(c) of the Act.

3. **This case also raises an important issue of federal labor law under the National Labor Relations Act that this Court has not addressed in 50 years or since its *Gissel* decision. In a non-*Gissel* bargaining order case, what effect should significant changed circumstances that have occurred since the bargaining unit was originally designated and certified, years earlier, but before final resolution of the parties' obligation to bargain in that unit, have on continued appropriateness of that unit and on the Section 7 self determination rights of all current employees, who had no opportunity to exercise that right?**

The voting unit designated by the Board after an evidentiary hearing, and later certified by it, was premised on the facts and circumstances existing at the two Indianapolis distribution centers in June, 1997. Macmillan, and then

Pearson, exercised appeal rights challenging the Board's decisions. In 1999, the Court of Appeals granted Macmillan's Petition for Review and remanded the case. In 2000, the Board held an evidentiary hearing on the Union's objections to the 1997 election. At that hearing, Pearson (having purchased Macmillan two years earlier) made a motion raising the issue of continued appropriateness of the unit in view of significant and numerous changed circumstances and sought to offer evidence in support. The ALJ denied Pearson's motion and the Board perfunctorily, and without analysis, affirmed in a footnote. (App. 23a) Pearson then moved the Board for rehearing and to reopen the record on changed circumstances and continued appropriateness of the unit. The Board, by a vote of 2 to 1, denied Pearson's motion. (App. 12a-18a). The Board and Court indicated that some of the changed circumstances cited by Pearson were only relevant in Gissel bargaining order type cases. (App. 10a).

In other non-*Gissel* situations, changed circumstances can result in certified bargaining units being no longer appropriate. *See e.g.*, *Kelley Bus. Furniture, Inc.*, 288 NLRB 474 (1988) (certified unit no longer appropriate after employer consolidated multiple operations to single location); *Ramada Beverly Hills*, 278 NLRB 691 (1986) (significant changes resulted in substantial centralization of administration and operations); *St. Bernadette's Nursing Home*, 234 NLRB 835 (1978) (employer's refusal to bargain with certified union not a violation of the Act because of changed circumstances after the union was certified); *Border Steel Rolling Mills, Inc.*, 204 NLRB 814 (1973) (unit no longer distinct due to changed circumstances).

Pearson proffered evidence of significant changed circumstances that were multiple in both number and variety, over a four plus year continuum, and included change in geographic location, change in ownership, change in management, change in job classifications, change in human resources,

change in products handled, change in methods, changes in workforce size and complement; doubling in size of the facility, etc. Dissenting Board Member Hurtgen correctly recognized Pearson should have been allowed a hearing and an opportunity to introduce evidence about changes because the unit certified several years earlier was for two facilities in Indianapolis, and circumstances may have so changed as to not support a bargaining order for current Pearson employees in Lebanon. (App. 17a-18a). Those changed circumstances justified a hearing to allow analysis of whether a previously designated and certified unit remains appropriate such that a union should be imposed on current Pearson employees at Lebanon who had no say. *Renaissance Ctr. P'ship.*, 239 NLRB 1247 (1979) (employees in certified unit were subsequently consolidated with another group of employees that had been readily distinguishable prior to consolidation—new election ordered to determine whether consolidated group desired union representation).

By rejecting the changed circumstances issue and declining to hold a hearing, the Board is imposing a union on hundreds of current Pearson employees at the Customer Center in Lebanon, the vast majority of whom have never had the opportunity to exercise their Section 7 statutory right to choose or not choose union representation. The purpose of the National Labor Relations Act is to establish individual employee rights under Section 7, including the important right of self-determination. *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 US 50, 61-62 (1975) (Section 7 affirmatively guarantees employees the most basic rights of industrial self determination); *see also*, *Lechmere, Inc. v. NLRB*, 502 US 527, 531-32 (1992) (by its plain terms, the NLRA confers rights only on employees); *Pattern Makers' League of N. Am., AFL-CIO v. NLRB*, 473 US 95, 116 (1985) ("[T]he employees' rights under [Section] 7 include . . . the right to refrain from joining or assisting a labor organization . . . .") (White, J., concurring). In fact, our

Nation's labor policy is founded on this right of employee self determination. *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1077 (D.C. Cir. 1996).

Fifty years ago in *Brooks v. NLRB*, 348 U.S. 96, 104 (1954), this Court held that an employer presented with evidence shortly after a union won a representation election, that a majority of its employees did not want the union, still was required to recognize and bargain with the union for a 12-month period after certification, absent unusual circumstances. However, the Court has not addressed changed circumstances since then, nor since development of the law under its 1969 decision in *Gissel*, and not in a case involving a seven-year time span.

In *Gissel*, *supra*, this Court first recognized that a bargaining order can be an appropriate remedy against an employer who has committed significant unfair labor practices. Since then numerous courts of appeal have recognized that in *Gissel* cases changed circumstances must be taken into account as to the appropriateness of imposing the bargaining order. *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1171 (D.C. Cir. 1998); *Charlotte Amphitheater Corp.*, 82 F.3d at 1078 (recognizing at least eight circuits agree); *Harper Collins San Francisco v. NLRB*, 79 F.3d 1324, 1332-33 (9th Cir. 1996); *Impact Industries, Inc. v. NLRB*, 847 F.2d 379 (7th Cir. 1998). The reason it is important for courts to look at changed circumstances in *Gissel* bargaining order cases is because there is an "obvious danger that a bargaining order that is intended to vindicate the rights of past employees will infringe upon the rights of the current ones to decide whether they wish to be represented by a union." *Charlotte Amphitheater Corp.*, 82 F.3d at 1078. *See Harper Collins*, 79 F.3d at 1333 (effect could be to impose upon current employees a union not desired by a majority of them).

While this is not a *Gissel* bargaining order case, that very same danger and rationale exist here. There have been significant changed circumstances over the course of a number of years since the time the Board designated and certified the unit of distribution employees at Rockville Road and Northwest Boulevard in Indianapolis. If the bargaining order is enforced, a vast majority of current Pearson employees at the Lebanon Customer Center will have a union imposed upon them without ever having been given the opportunity to exercise their Section 7 right of self determination.

This Court has not addressed the appropriate consideration and effect of changed circumstances in a non-*Gissel* case since *Gissel*, or in a case involving a time span of almost seven years between designation/certification and legal resolution, and it is an important issue of federal labor law. The standards to be applied under the Act in resolving the tension between the fundamental right of employee self determination guaranteed by Section 7 (upon which our national labor policy is premised) and the enforcement of bargaining orders in circumstances such as these should be defined.

CONCLUSION

For all the reasons articulated above, Pearson Education prays that this Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

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